APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56602
D.C. No. CV-02-0158-AHM
Central District of California, Los Angeles

Filed August 21, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

M2 COMMUNICATIONS, L.L.C., a limited liability company; JEFF MOSELEY, an individual; GAYLORD ENTERTAINMENT, INC., a corporation, Defendants-Appellees.

****1** ORDER

Before PREGERSON, CANBY, and BEEZER, Circuit Judges.

Appellant M2 Software's motion to recall the mandate and vacate the opinion in the above case is DENIED. M2 Software's request that the recusal motion be assigned to a new panel is DENIED. M2 Communications' request for sanctions against M2 Software is also DENIED.

****2** ***869*** PREGERSON, Circuit Judge, specially concurring:

I concur in the court's order.

To set the matter straight, at the time this case was assigned to this panel and at the time we decided it, I owned an equitable interest in Time Warner. Time Warner was not a party to the suit. Unbeknownst to

me, Time Warner had an option (never exercised) to purchase up to 19.9% of Warner Music - also not a party to this suit. See David A. Vise, *Time Warner Sells Music Unit to Bronfman for $2.6B*, Wash. Post, Nov. 24, 2003. Warner Music owned Word Entertainment, not a party to this suit either. See 10-Q filing for Warner Music Group, at 7 (June 13, 2005), *available at* http://www.sec.gov/Archives/ edgar/data/1319161/000104746905017103/0001047469-05-017103-index.htm. Word Entertainment had an exclusive distribution contract with M2 Communications, a small Christian music label and a party to this suit. See Word Entertainment, *available at* http://www.wmg.com/recordedmusic/?promo=24020007.

In sum, then, I had no interest "however small" in the subject matter in controversy. Instead, I had an interest in a company (a) that had an *option* to purchase 19.9% of a company (b) that owned a company (c) that *contracted* with a ***3* party to this suit. Such an indirect interest does not require recusal. See *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir.2000) ("Disqualification is not required on the basis of remote, contingent, indirect or speculative interests.") (citations omitted). Indeed, M2 Communications was not required to list, and did not list, Time Warner or Warner Music on its Federal Rule of Appellate Procedure 26.1 disclosure, which requires the parties to list only parent corporations and corporations that own 10% of the entity's stock.

Accordingly, I had no financial interest in the subject matter of this suit that required recusal under § 455(b). Nor, given the remote nature of my interest, could my impartiality reasonably have been called into question, and thus recusal is not required under § 455(a).

***4* BEEZER, Circuit Judge, specially concurring:

I concur in the court's order denying the motion to recall the mandate and the denial of the motion for

sanctions. Because the mandate is not recalled, I believe we have no jurisdiction to address the challenge to Judge Pregerson's participation in this appeal.

M2 Software, Inc. moves the court for an order recalling the mandate and vacating the opinion. Appellant's counsel asserts that Judge Pregerson owns stock in Time Warner, Inc. and that such ownership required his recusal from participation in the decision of the case pursuant to 28 U.S.C. § 455.

Our authority to recall a mandate is to be "exercised only in extraordinary circumstances" and the "sparing use of the power demonstrates that it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). When a motion to recall a mandate is based on allegations of fraud on the court or allegations of misconduct affecting the integrity of the judicial process, the harm must be "gross" and enforcement of the judgment "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *overruled on other grounds*, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976).

**5 Nothing presented by M2 Software suggests perpetration of fraud, gross misconduct or that enforcement of the judgment *870 would be manifestly unconscionable. Nor is the motion to recall the mandate "grounded in any real infirmity in our previous decision, either when it was entered or when it is viewed in light of later Supreme Court decisions." *Nevius v. Sumner*, 105 F.3d 453, 460-61 (9th Cir.1996). The Supreme Court has twice considered the opinions of this panel in this matter and has twice denied certiorari. The interests of finality and repose balanced against the claims of M2 Software require denial of the motion to recall the mandate.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-55957
D.C. No. CV-00-02853-AHM
Central District of California, Los Angeles

Filed August 21, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

MADACY ENTERTAINMENT, a corporation; HANDLEMAN COMPANY, a corporation; SFX ENTERTAINMENT, a corporation, Defendants-Appellees.

***1** ORDER

Before PREGERSON, CANBY, and BEEZER, Circuit Judges.

Appellant M2 Software's motion to recall the mandate and vacate the opinion in the above case is DENIED. M2 Software's request that the recusal motion be assigned to a new panel is DENIED. Madacy Entertainment's motion for sanctions against M2 Software is also DENIED.

***2** PREGERSON, Circuit Judge, specially concurring:

I concur in the court's order.

To set the matter straight, at the time this case was assigned to this panel and at the time we decided it, I owned an equitable interest in Time Warner. Time Warner was not a party to the suit. Unbeknownst to

me, Time Warner had an option (never exercised) to purchase up to 19.9% of Warner Music-also not a party to this suit. See David A. Vise, *Time Warner Sells Music Unit to Bronfman for $2.6B*, Wash. Post, Nov. 24, 2003. Warner Music owns Warner Special Products, not a party to the suit either. See Warner Special Products FAQ's, *available at* http://www.warner specialproducts.com/wsp/ wcm_help/helpfaq.jsp. As indicated on the allegedly infringing CDs at issue in this case, Warner Special Products manufactured, produced, and licensed music for a division of Madacy, a party to this suit.

In sum, then, I had no interest "however small" in the subject matter in controversy. Instead, I had an interest in a company (a) that had an *option* to purchase 19.9% of a company (b) that owned a company (c) that manufactured, produced, and licensed music for a corporate division of a party to this suit. Such an indirect interest does not require recusal. See *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir.2000) ***3* ("Disqualification is not required on the basis of remote, contingent, indirect or speculative interests.") (citations omitted). Indeed, Madacy was not required to list, and did not list, Time Warner or Warner**871* Music on its Federal Rule of Appellate Procedure 26.1 disclosure, which requires the parties to list only parent corporations and corporations that own 10% of the entity's stock.

Accordingly, I had no financial interest in the subject matter of this suit that required recusal under § 455(b). Nor, given the remote nature of my interest, could my impartiality reasonably have been called into question, and thus recusal is not required under § 455(a).

***4* BEEZER, Circuit Judge, specially concurring:

I concur in the court's order denying the motion to recall the mandate and the denial of the motion for sanctions. Because the mandate is not recalled, I believe

we have no jurisdiction to address the challenge to Judge Pregerson's participation in this appeal.

M2 Software, Inc. moves the court for an order recalling the mandate and vacating the opinion. Appellant's counsel asserts that Judge Pregerson owns stock in Time Warner, Inc. and that such ownership required his recusal from participation in the decision of the case pursuant to 28 U.S.C. § 455.

Our authority to recall a mandate is to be "exercised only in extraordinary circumstances" and the "sparing use of the power demonstrates that it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). When a motion to recall a mandate is based on allegations of fraud on the court or allegations of misconduct affecting the integrity of the judicial process, the harm must be "gross" and enforcement of the judgment "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *overruled on other grounds*, *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). ***5*

Nothing presented by M2 Software suggests perpetration of fraud, gross misconduct or that enforcement of the judgment would be manifestly unconscionable. Nor is the motion to recall the mandate "grounded in any real infirmity in our previous decision, either when it was entered or when it is viewed in light of later Supreme Court decisions." *Nevius v. Sumner*, 105 F.3d 453, 460-61 (9th Cir.1996). The Supreme Court has twice considered the opinions of this panel in this matter and has twice denied certiorari. The interests of finality and repose balanced against the claims of M2 Software require denial of the motion to recall the mandate.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-56602
D.C. No. CV-02-01588-AHM
Central District of California, Los Angeles

Filed October 26, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

M2 COMMUNICATIONS, L.L.C., a limited liability company; JEFF MOSELEY, an individual; GAYLORD ENTERTAINMENT, INC., a corporation, Defendants-Appellees.

***1* ORDER

Before: Judge PREGERSON, CANBY, and BEEZER, Circuit Judges.

Judge Pregerson has voted to deny appellant's petition for rehearing en banc. Judges Canby and Beezer have recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petition for rehearing en banc filed September 28, 2006 is DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-55957
D.C. No. CV-00-02853-AHM
Central District of California, Los Angeles

Filed October 26, 2006

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff-Appellant,

v.

MADACY ENTERTAINMENT, a corporation; HANDLEMAN COMPANY, a corporation; SFX ENTERTAINMENT, a corporation, Defendants-Appellees.

***1* ORDER

Before: Judge PREGERSON, CANBY, and BEEZER, Circuit Judges.

Judge Pregerson has voted to deny appellant's petition for rehearing en banc. Judges Canby and Beezer have recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See. Fed. R. App. P. 35(b).

The petition for rehearing en banc filed September 28, 2006 is DENIED.

APPENDIX E

UNITED STATES COURT DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV-02-01588-AHM (MCx)

Filed August 25, 2003

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff,

v.

M2 COMMUNICATIONS, L.L.C., a limited liability company; JEFF MOSELEY, an individual; GAYLORD ENTERTAINMENT, INC., a corporation, Defendants.

****1** JUDGMENT

****2** This Court has considered Defendant's motion for Summary Judgment and Plaintiff's motion for Summary Adjudication as to likelihood of confusion. After service of the draft Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Adjudication, neither party requested a hearing.

Therefore, on consideration of all the evidence set forth in the papers submitted, Defendants' motion is GRANTED and Plaintiff's motion is DENIED based on the Court's finding that:

1. Federal jurisdiction is appropriate because two of the claims for relief alleged in the Complaint present a federal question, namely the application of provisions of the Lanham Act, 15 U.S.C. § 1051, et seq., particularly, 15 U.S.C. §§ 1114 and 1125.

2. Under 28 U.S.C. § 1338(b), this Court is granted jurisdiction to consider the remaining claims for

relief alleged in the Complaint which relates to California and common law claims of trademark infringement and unfair competition because such claims are joined with substantial and related claims under the federal trademark laws.

3. Under the doctrine of Supplemental Jurisdiction as codified at 28 U.S.C. § 1367, this Court has jurisdiction to consider the California and common law claims of trademark infringement, trade name infringement, and unfair competition.

4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because Defendant resides in this district, and the acts complained of occurred within this district.

5. There is no genuine issue as to any material fact.

6. There is no likelihood of confusion as between Plaintiff's M2 trade name and M2 branded products and services and Defendant's M2 Communications trade name and M2.0 branded Christian music products. Specifically, Plaintiff's 1st – 7th claims (trademark infringement under 15 U.S.C. § 1114, common law trademark ***3* infringement, false designation of origin under 15 U.S.C. § 1125, trade name infringement under Cal. Bus. & Prof. § 14402, common law trade name infringement, unfair competition under Cal. Bus. & Prof. § 17200, and common law unfair competition) all rely on the same likelihood of confusion determination. Plaintiff's 8th claim for relief was raised against defendant Gaylord Entertainment Company ("Gaylord") only and Gaylord has already been dismissed by this Court for lack of personal jurisdiction.

7. In the Ninth Circuit, the likelihood of confusion analysis is analyzed through the "Sleekcraft" factors: 1) strength of the mark; 2) relatedness of the goods; 3) degree of similarity of the marks; 4) evidence of actual confusion; 5) marketing channels; 6) degree of purchaser care; 7) defendant's intent in selecting the

mark; and 8) likelihood of expansion of the product lines. AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979).

8. To prevail on Defendant's Summary Judgment Motion, Plaintiff must "create a genuine issue thaqt confusion is probable, not simply a possibility." Cohn v. Petsmart, Inc., 281 F.3d 837, 842 (9th Cir. 2002) (quotation omitted).

9. After analyzing each of the Sleekcraft factors, the undisputed evidence establishes that Plaintiff cannot satisfy its burden of proof in this case as to likelihood of confusion under either forward or reverse confusion theories. Accordingly, as a matter of law, judgment is hereby entered in favor of Defendant on all claims.

10. After a review of all evidence presented, Defendant's request for attorney's fees pursuant to 15 U.S.C. § 1117(a) is DENIED. Defendant may submit a bill of costs in accordance with Local Rule 54-3. ***4*

11. There is no just reason for delay in the entry of this Judgment, and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk of this Court is directed to enter this Judgment upon the docket forthwith.

DATED: August 25, 2003
s/ A. HOWARD MATZ
United States District Judge

APPENDIX F

UNITED STATES COURT DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

Case No. CV-00-02853-AHM (MCx)

Filed May 30, 2003

M2 SOFTWARE INC.,
a Delaware corporation, Plaintiff,

v.

MADACY ENTERTAINMENT, a corporation, HANDLEMAN COMPANY, a corporation, and SFX ENTERTAINMENT, a corporation, Defendants.

****1** JUDGMENT

****2** This action came on for trial before the Court and a jury, the Honorable A. Howard Matz, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS HEREBY ORDERED AND ADJUDGED
1. that plaintiff M2 Software, Inc. take nothing;
2. that the action against defendants Madacy Entertainment Group, Inc. and Handleman Company be dismissed on the merits; and
3. that defendants Madacy Entertainment Group, Inc. and Handleman Company recover of plaintiff M2 Software, Inc. their costs of action.

Dated at Los Angeles, California, this 30 day of May, 2003,

/s A. HOWARD MATZ
United States District Court Judge

APPENDIX G

Amendment V, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

28 U.S.C. § 455

Disqualification of justice, judge, or magistrate judge.

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization

is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

APPENDIX I

28 U.S.C. § 46

Assignment of judges; panels; hearings; quorum.

a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95–486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment

pursuant to section 294 (c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or

(2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

APPENDIX J

28 U.S.C. § 144

Bias or prejudice of judge.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.